No. 11,137

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. J. Reynolds Tobacco Company
(a corporation),
Appellant,

vs.

George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby,
Appellees.

On Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

Appellant's recital of the facts insofar as the evidence is concerned, sets forth generally, that portion of the record that they consider favorable to them.

The testimony naturally must be taken as a whole and it cannot be of any great value to quote an isolated answer here and there in the testimony of a witness.

(NOTE): All numbers herein contained, such as 417, refer to the number of the page of the printed record unless otherwise specifically stated.

The appellees submit that the record fairly shows evidence sufficient to go to the jury on the following facts:

That Hair was drinking and undoubtedly proceeding as a drunken, reckless driver at the time of the unfortunate accident; that he had hauled guests to the knowledge of the company repeatedly; that he was in the course of company business, being in his own territory, calling on his dealers; advertising his products during business hours; making a written report that he was on company business and generally conducting himself as he had been in the habit of conducting himself, while he had exclusive control of the car in the past.

There was brought home to the appellant, specific knowledge of Hair having killed a man while Hair was driving a company truck, when he was drunk; when he had a drunken companion with him and when he had whiskey in the truck, after attending night clubs and at a time of night when there was no possible excuse for him to be using the company truck. These facts were told directly to the division manager, Donnelly, by the Chief of Police of the City of Pocatello, which Donnelly specifically admitted. (R. 276.) The chief of police, Pugmire, so advised Donnelly:

> "A. I advised Mr. Donnelly that Hair was under the influence of intoxicating liquor." (R. 312.)

> "A. I told him he had another young man in the automobile who was also intoxicated and that he had been charged with intoxication." (R. 313.)

The general reputation of Hair was proven to be that of a drunken, reckless driver during the years 1939, 1940 and 1941. (Witnesses, Pugmire, Close and Buskirk.) It is objected that the officers secured their information as to the reputation entirely from other officers. That is the general purport of Pugmire's testimony, but Mr. Close testified he formed his opinion from information he received from different parties (R. 333), and under cross-examination, testified:

"Q. You never saw him driving an automobile under the influence of liquor?

A. Yes sir." (R. 332.)

The witness Buskirk based his opinion on information and talk of the general public.

"A. Just general talk of the police officers and the public.

Q. Who of the public did you hear?

A. The general public." (R. 339.)

That Hair, Donnelly and Roe realized that upon Hair's conviction of a manslaughter charge for drunken driving under the laws of Idaho, his license would be revoked. Hair and Donnelly discussed it and Roe recognized it when he suggested in his telegram that Hair be continued in the employ of the appellant until the outcome of the manslaughter trial was had. The record on this testimony is quoted infra.

SUMMARY.

The complaint of the appellees as amended at the trial, charges that Avenell Newby, the deceased, was riding as a guest of Rulon D. Hair, an agent of the Reynolds Tobacco Company, who was in the course of his employment at the time of the accident, and alleges in the alternative that the appellant retained Hair in its employ, knowing that he was a careless, reckless, drunken and incompetent driver.

The appellant, having admitted the agency and ownership of the automobile, it devolved upon the appellees then to prove:

1. That Avenell Newby, having been a guest, that the motor vehicle was operated with a reckless disregard of her right under the guest statute and that the appellant had waived its instruction to its agent concerning the hauling of guests.

2. That Hair, the agent, was acting for the company in the course of his employment and was on company business, or

3. That he was a careless, reckless, drunken and incompetent driver and that this fact was known, or by the use of ordinary and reasonable diligence, could have been known to the appellant.

If the appellees met the burden of proof upon them, then they were entitled to go to the jury, unless the specification of error relied upon by appellants, that the trial of the case could not proceed until the costs on the former appeal had been paid, is well taken.

I.

THE DEMAND THAT COSTS BE PAID BY THE APPELLEES BEFORE THE CASE PROCEEDED WAS ADDRESSED TO THE DISCRETION OF THE COURT AND THE DEMAND NOT HAVING BEEN MADE TIMELY AND APPELLANT HAVING WAITED TO MAKE ITS DEMAND, KNOWING THE CONDITIONS, IT WAS NOT ERROR FOR THE COURT TO PERMIT THE CASE TO GO TO TRIAL, ESPECIALLY WHEN THE APPELLEES, BOTH BEFORE AND AFTER TRIAL, OFFERED TO CREDIT THE AMOUNT OF THE COSTS ASSESSED ON APPEAL, TO THE PRESENT VERDICT.

Golden v. New York Ry. Co., 222 Fed. 348;
28 *U.S.C.A.,* Sections 635 and 832;
Fisher v. Cushman, 99 Fed. (2d) 918;
50 *U.S.C.A., War,* Section 114;
Deodrich v. United States, 67 Fed. (2d) 318;
Land Oberoesterreich v. Gude et al., 19 Fed. Supp. 1021;
Cloquet Lumber Co. v. Burns, 222 Fed. 857.

II.

THE EVIDENCE WAS AMPLE TO SHOW A VIOLATION OF THE GUEST STATUTE.

Section 48-901, Idaho Code 1932, as amended provides:

"48-901. Liability of Motor Owner to Guest. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by

his * * * *intoxication* or his reckless disregard of the rights of others."

Manion v. Weybright, 59 Ida. 643;

R. J. Reynolds Tobacco Co. v. Newby et al., 145 Fed. (2d) 768;

George v. Stanfield, 73 Fed. Supp. 486;

Meissner v. Papas, 124 Fed. (2d) 723;

Brock v. Waldron, 14 Atl. (2d) 715;

Lionetti v. Coppola, 161 Atl. 797;

Bordonaro v. Senk, 147 Atl. 136;

Cleveland C. C. & St. Ry. Co. v. Loret, 68 Fed. 823;

Mescher v. Brogon, 227 N. W. 645;

Dawson v. Salt Lake Hardware Co., Ida., 136 Pac. (2d) 733;

Willi v. Schaefer-Hitchcock Co., 53 Ida. 367.

III.

UNDER THE FACTS THE QUESTION OF WHETHER APPELLANT HAD WAIVED ITS INSTRUCTION TO ITS AGENT WITH REFERENCE TO HAULING OF GUESTS, WAS FOR THE JURY.

The evidence is conclusive that appellant had waived the instructions:

Manion v. Weybright, 59 Ida. 643;

Reynolds Tobacco Co. v. Newby et al., 145 Fed. (2d) 768.

IV.

THE FACTS JUSTIFIED THE JURY IN FINDING THAT HAIR WAS ACTING IN THE COURSE OF HIS EMPLOYMENT.

Manion v. Weybright, 59 Ida. 643;

Reynolds Tobacco Co. v. Newby et al., 145 Fed. (2d) 768;

Gale v. Independent Taxi Owners Ass'n, 84 Fed. (2d) 249;

Young et al. v. Wilby Carrier Corpn., 54 Fed. Supp. 912;

Mullens v. Ritchie Grocery Co., 35 S. W. (2d) 1010;

Malloy v. Rosenbaum, 103 Atl. 882;

Bimm v. Forrest, 213 Fed. 763;

Vitelli v. Minutoli, 4 Pac. (2d) 818;

Schweinhaut v. Flaherty, 49 Fed. (2d) 535;

Black v. Coffin, 126 Pac. 871;

School District No. 26 v. Baxter County Board of Education, 35 S. W. (2d) 1013;

Trachtenberg v. Castillo, 257 S. W. 657;

Homan v. Borman, 19 S. W. (2d) 441;

Anderson, An Automobile Accident Suit, Section 563, page 657.

V.

THE EVIDENCE WAS SUFFICIENT TO GO TO THE JURY ON THE QUESTION OF THE NEGLIGENCE OF APPELLANT IN RETAINING HAIR IN ITS EMPLOY AFTER KNOWLEDGE OF HIS KILLING A MAN WHEN DRUNK AND AFTER THE TESTIMONY OF THE CHIEF OF POLICE, SHERIFF AND A POLICE OFFICER AS TO HIS REPUTATION.

Mitchell v. Churches, 206 Pac. 6;
Somerville v. Keeler, 145 So. 721;
Buckingham v. Gahbert, 163 N. E. 306;
LeBlanc v. Pierce Motor Co., 30 N. E. (2d) 684;
Pfaehler v. Ten Cent Taxi Co., 18 S. E. (2d) 331;
Chaney v. Duncan, 110 S. W. (2d) 21;
Tonis v. Eding, 273 N. W. 761;
Hala v. Worthington, 31 Atl. (2d) 844;
Gossett v. Von Egmond, 155 Pac. (2d) 304;
Elliott v. Harding, 140 N. E. 338, 36 A. L. R. 1128;
Anderson v. Daniel, 101 So. 498;
Laney v. Blackburn, 144 So. 126.

The following cases are of a special interest:
Mareas v. Fred Harvey, 146 Fed. (2d) 989;
Bock v. Sellers, 285 N. W. 437;
Seins Heimer v. Burkhart, 122 S. W. (2d) 1063.

VI.

A MASTER WHO RETAINS IN HIS EMPLOY, A RECKLESS, DRUNKEN OR INCOMPETENT DRIVER, OR ONE WHO IS KNOWN TO HAVE DRIVEN WHEN DRUNK AND CAUSED SO SERIOUS AN ACCIDENT AS THE DEATH OF A PERSON, FOR WHICH HE HAS BEEN CONVICTED OF MANSLAUGHTER, IS LIABLE FOR THE RECKLESSNESS OF SAID EMPLOYEE.

Department of Water and Power of the City of Los Angeles v. Anderson, 95 Fed. (2d) 577.

"The officers of the Construction Company, however, were fully advised of Johnson's propensities, that he did get drunk, that he was addicted to the use of liquor, and they were not justified in assuming that he would remain sober merely because the truck was put in his charge."

Nicholson Const. Co. et al. v. Lane, 150 S. W. (2d) 1069.

"Incompetence, recklessness, and accident are so universally the sequel of drinking that an owner of an automobile is put on notice of what is likely to occur if he does not take active steps to prevent any one addicted to drinking from driving it. If he fails in the performance of this duty, he should suffer the consequences of his neglect."

Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 582, 50 A.L.R. 1425.

"It was the duty of Crockett in the selection of Holt as his agent to use reasonable care to ascertain his competency to drive a car and the existence of habits which would make it unsafe to place so dangerous an agency in his charge. The owner owed a duty to the public to know something about

the character and habits of an employee in whose charge he placed an automobile. A rapid moving and heavy vehicle becomes highly dangerous when negligently operated. It is evident from the readiness with which Holt engaged in the drunken carousal so early in the morning that he must have been a man of inebriate habits and that Crockett in whose employ he had been for a year or more before the accident either knew or was charged with the duty of knowing this fact, which is further emphasized both by the continued employment of Holt after the accident for approximately a year and up to the time of the trial (whether longer or not, we are not advised * * *.

Crockett v. United States et al., 116 Fed. (2d) 646.

"The facts supported by competent evidence, both direct and circumstantial, and believed by the jury, as disclosed by their verdict, are that the employers actually knew that the employee 'was occasionally a drinking man'; and the proof is, further, that while he did not get drunk in the daytime or while around the office of his employers, he did frequently get drunk in the evening and at night, and that he was known to the police force of the municipaltiy, and to others who testified, as an habitual drunkard and that such was his general reputation. His employers had sufficient actual knowledge to put them upon inquiry which, if reasonably pursued, would have led to full knowledge.

The employers contend here that they had instructed the employee not to use the automobile except during business hours, and that the decedent was the guest not of the owners of the car

but solely of the drunken employee. We have already stated that the facts were sufficient to charge the employers with knowledge that the offending employee would frequently get drunk, and they are further charged with the contemplation of that which according to common knowledge a drunken man will likely do, that is, that such a man when under the influence of liquor will drive about in an automobile if one be available to him, without regard to orders; that he will seek company, that is, will invite another or others to ride with him; and that when driving in a drunken condition he is dangerous to all who are with him or in his vicinity."

Levy v. McMullen, 152 So. 899;

Russell Const. Co. v. Ponder, 186 S. W. (2d) 233;

Talbert v. Johnson, 99 Fed. (2d) 813;

Harrison v. Carroll, 139 Fed. (2d) 427;

Cleveland Nehi Bottling Co. v. Schenk, 56 Fed. (2d) 941;

Guedon v. Rooney, 87 Pac. (2d) 209, 120 A.L.R. 1298. See Note page 1311;

Reed v. Owens, 69 Pac. (2d) 265;

Priestly v. Skourup, 45 Pac. (2d) 852, 100 A.L.R. 916. See also 36 A.L.R. 1132;

Schweinhaut v. Flaherty, 49 Fed. (2d) 535;

39 *Corpus Juris,* pages 640 and 641, also 533 to 535;

Wishbone v. Yellow Cab Co., 97 S. W. (2d) 452;

Gardner v. Solomon, 75 So. 623;

Rocca v. Steinmetz et al., 214 Pac. 259;

Southern Pacific Co. v. Hetzer, 135 Fed. 276;

Lufty v. Lockhart, 296 Pac. 976.

It was admitted that Donnelly and Hair discussed the fact that Hair would lose his license to drive if convicted. (R. 440.)

"Driving While Under the Influence of Intoxicating Liquor or Narcotic Drugs—Penalty.—Every person who is convicted of a violation of Section 48-502 relating to habitual users of narcotic drugs and driving while under the influence of intoxicating liquor or narcotic drugs shall be punished by imprisonment in the county or municipal jail for not less than thirty days nor more than six months or by fine of not less than $100.00 nor more than $300.00 or by both such fine and imprisonment. On a second or subsequent conviction he shall be imprisoned in the state penitentiary at hard labor for not less than two years and not more than five. The commissioner shall revoke the operator's or chauffeur's license of the person so convicted, if any such license has been issued."

Section 48-558, Idaho Code 1932.

"Report of Conviction to Be Sent to Department.—a. Every justice of the peace or police judge or court in this state shall keep a full report of every case in which a person is charged with violation of any provision of this chapter, and in the event that such person is convicted or that his bail is forfeited, an abstract of such report shall be sent forthwith by the justice of the peace or police judge or court to the department but this requirement shall not be deemed to make such court a court of record.

b. Abstracts required by this section shall be made upon forms prepared by the department and shall

include all necessary information as to the parties to the case, the nature of the offense, the date of hearing, the plea, the judgment, the amount of the fine or forfeiture, as the case may be, and every such abstract shall be certified by the justice of the peace, police judge or clerk of such police court as a true abstract of the record of the court.

c. Each clerk of any court of record of this state shall also, within ten days after any final judgment of conviction of any violation of any of the provisions of this chapter, send to the department a certified copy of such judgment of conviction. Certified copies of the judgment shall also be forwarded to the department upon conviction of any person of manslaughter or other felony in the commission of which a vehicle was used. The said department shall keep such records in its office, and they shall be open to the inspection of any person during reasonable business hours.

d. Failure, refusal or neglect to comply with any of the provisions of this section shall constitute misconduct in office and shall be grounds for removal therefrom.

e. The reports herein required to be made and certified shall be without fee."

Section 58-561, Idaho Code Annotated, 1932.

The facts as shown by the present record, bring the case within the following rule:

"A habit of negligence that is known, or that by the exercise of reasonable care would have been known, to a master, and notorious acts of negligence, such as those which cause collisions of

trains and the *DEATH OF PASSENGERS,* may render a servant incompetent and impose upon the master the duty of discharging him.

Specific acts of negligence of which the master has notice are conceded to be admissible to prove incompetence, and a general reputation for incompetence is admissible to show that the master, by the exercise of ordinary care, would have known of the incompetence of the servant."

Southern Pacific Co. v. Hetzer, 135 Fed. Rep. 276.

After incompetency has been shown knowledge of the master is provable by reputation.

Vanner v. Dalton, 159 So. 558;

Pittsburgh Railways Co. v. Thomas, 174 Fed. 591.

The Reynolds Tobacco Co. was charged, not only with the fact that Hair had the reputation as a drunken driver, but were chargeable with all information that came to them direct and regardless of whether he had such a reputation, if they had facts or by the use of reasonable diligence, could have learned the facts as to Hair's habits, they were bound by these facts.

Hair's reputation was not the only source of knowledge as to his habits of driving and they were charged with any other knowledge they may have had.

"A father who has reason to believe, from observation of a son's habits or otherwise, that son is a careless driver, must deny son use of automobile irrespective of son's reputation as driver."

Reid et al. v. Owens et al., 69 P. (2d) 265.

VII.

IT WAS WITHIN THE DISCRETION OF THE COURT TO DETERMINE WHETHER OR NOT THE EVIDENCE OF THE CHARACTER WITNESSES, CLOSE, PUGMIRE AND BUSKIRK, WAS COMPETENT AND ADMISSIBLE AND THE EVIDENCE WAS PROPERLY RECEIVED UNDER THE OVERWHELMING WEIGHT OF AUTHORITY.

"Where impeaching witness testifies that she knows reputation for truth and veracity of another witness, any lack of knowledge shown upon cross-examination goes only to weight of testimony, and not its competency."

State v. Hooker, 170 Pac. 374, 99 Wash. 661.

"It is within the province of the court to say whether or not evidence is competent or admissible, but its weight and credibility are primarily for the jury. There is no more justification for the Court to assume the functions of the jury than there is for the jury to undertake to assume the duties of the Court. Sec. 4824, Rev. Codes, provides: 'Upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: Provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside.'"

State v. Blanchard, 27 Ida. 500.

"Impeaching character witness after stating that he knows another's general reputation and character, may say it is good or bad, or may volun-

tarily, without suggestion from counsel, amplify or qualify his testimony."

State v. Hicks, 157 S. E. 851, 200 N. C. 539.

"Refusal to permit defendant's witness to testify that state's witness' general reputation for truth and veracity was such as would not entitle him to belief on oath *HELD* error."

Robertson v. State, 282 S. W. 587, 104 Tex. Cr. R. 85.

"Exclusion of evidence of impeaching witnesses after proper foundation is erroneous, in case question to impeaching witness is not so general as to introduce irrelevant and improper testimony."

Nash v. Fidelity-Phenix Fire Ins. Co., 146 S. E. 726, 106 W. Va. 672, 63 A.L.R. 101.

Swafford v. United States, 25 Fed. (2d) 581 and 584;

Merrill v. United States, 6 Fed. (2d) 120 (9th Circuit);

Held v. United States, 260 Fed. 932;

Colbeck v. United States, 10 Fed. (2d) 401;

Nash v. Fidelity-Phenix Fire Ins. Co., 146 S. E. 726;

State v. Driver, 107 S. E. 189;

Spotswood v. Spotswood, 89 Pac. 362;

Dent v. State, 84 S. E. 584;

Crabtree v. Hagenbaugh, 79 Am. Decs. 325;

Cohen v. U. S. 291 Fed. 370;

28 R.C.L., pages 628 and 629;

Hinson v. State, 138 American State Reports, 119;

State v. Higgs, 259 S. W. 454;
Stacy v. State, 264 S. W. 967;
Ward v. State, 175 Pac. 557;
Marshall v. Carr, 118 Atl. 621.

"The four impeaching witnesses stated they resided in Caruthersville and had known the appellant for a number of years up to December 29, 1929, when the attempted robbery was committed. One witness said he did not know what appellant's reputation was on or about that particular date; but in answer to the question, 'Is that reputation good or bad?' apparently, and in one or two instances directly, referring to the period up to December, 1929, all four answered 'Bad.' The questions and answers are a little vague but we can see no prejudicial error. There is nothing to show the testimony was limited to a period so remote as to destroy its probative force."

State v. Scott, 58 S. W. (2d) 275, 90 A.L.R. 860.

VIII.

WHERE GENERAL VERDICT IS RENDERED FOR A PLAINTIFF, WHERE THE COMPLAINT IS BASED UPON DIFFERENT ACTS OF NEGLIGENCE OR ON MORE THAN ONE COUNT, THE VERDICT IS SUFFICIENT IF SUSTAINED UNDER EITHER THEORY IN ABSENCE OF A MOTION OR REQUEST ON THE POINT IN THE TRIAL COURT.

The appellant, not having requested any finding on the question of the two theories of liability, cannot now first raise this question on appeal if the verdict is supported by proof, either, that the agent was acting

in the course of his employment or that the master knew him to be a reckless, drunken, incompetent driver.

Levy v. McMullan, supra;

Boomer v. Isley, 49 Ida. 666, 290 Pac. 405 and cases cited;

Judd v. O. S. L. R. R. Co., 55 Ida. 46, 44 Pac. (2d) 291;

Tannahill v. Lydon, 31 Ida. 608, 173 Pac. 1146;

Russell-Locke-Super-Service v. Vaughan, 40 Pac. (2d) 1090;

Kortz v. Guardian Life Insurance Co., 144 Fed. (2d) 676;

National Fire Ins. Co. v. School Dist., 115 Fed. (2d) 232;

Halla v. Worthington, supra.

Rule 49 of the Rules of Civil Procedure provides both for special verdicts and for a general verdict accompanied by answers to interrogatories. So much of subdivision (b) of said rule as is pertinent here, is quoted as follows:

> "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict."

The appellant did not request any interrogatory or interrogatories on the question of whether the jury found against appellant on the question of whether Hair was in the course of his employment or whether they found against appellant on the question of Hair being a reckless, drunken and incompetent driver, and

whether the appellant knew it. Not having requested any interrogatories or taken any exception to the Court submitting to the jury a general verdict, that question cannot now be raised.

> "Defendant, desiring specific instruction on punitive damage, should especially request it, where both actual and punitive damages are recoverable."

Crystal Dome Oil and Gas Co. v. Savic, 51 Ida. 409, 6 Pac. (2d) 155;

Lessman v. Auchustigui, 37 Ida. 127, 215 Pac. 450;

Joyce Bros. v. Stanfield, 33 Ida. 68, 189 Pac. 1104.

IX.

APPELLATE COURT CANNOT CONSIDER WHETHER VERDICT IS EXCESSIVE OR REVIEW THE SAME WHERE NEW TRIAL DENIED.

Cleveland Nehi Bottling Works v. Schenk, 56 Fed. (2d) 941;

Scott v. Baltimore & Ohio R.R. Co., 151 Fed. (2d) 61, decided August 14, 1945, Circuit Court of Appeals, Third Circuit;

Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 254, 77 L. Ed. 439;

Aetna Casualty & Surety Co. v. Yeats, 122 Fed. (2d) 350.

Under the Rules of Federal Procedure, denial of a motion for a new trial is not reviewable.

28 *U.S.C.A.,* Section 391. See note 4 for annotations.

The authorities are overwhelming on this proposition. Even if the Court could or would consider the motion for a new trial as reviewable the showing as to the newspaper clippings complained of is totally insufficient.

Langer v. U. S., 76 Fed. (2d) 817;

Spreckles v. Brown, 53 L. Ed. 477, 212 U. S. 208.

X.

WHERE VERDICT IS RIGHT ON THE MERITS JUDGMENT WILL NOT BE REVERSED FOR ERROR IN INSTRUCTIONS.

Chicago, Milwaukee & St. Paul Ry. Co. v. Ross, 112 U. S. 377, 28 L. Ed. 787;

28 *U.S.C.A.,* Section 391.

XI.

IT IS FUNDAMENTAL THAT THE GENERAL LAW OF THE STATE OF IDAHO CONTROLS THE COURT IN THIS CASE REMOVED FROM THE STATE TO THE FEDERAL DISTRICT COURT.

Erie R. R. Co. v. Tompkins, 82 L. Ed. 1188, 304 U. S. 64, 114 A.L.R. 1487.

At page 417 of 1 Fed. Rules Decisions, is found a treatise or lecture by Honorable Charles E. Clark, U. S. Circuit Court of Appeals of the Second Circuit, in

which he discusses the present Federal Rules of Civil Procedure and in discussing *Erie R. R. Co. v. Tompkins,* said:

> "As everyone legally minded now knows, the Tompkins case denied to the national government any 'general law' outside of specific statutory or constitutional grants of power and admonished the federal courts to look to the state precedents for the basic law which they should apply except for those federal specialties definitely committed to them.
>
> Now the policy of the new federal rules to establish a uniform flexible procedure for all the national Courts, one which may prove, as it already seems to be doing, to be a model for the various states, is certainly clear and definite. All matters of the operation of the business of the Courts should follow the one uniform model. Likewise the core of the Tompkins doctrine is similarly clear and specific. Throughout a given territory one law ought to prevail; and it is a blot on the idea of justice if two Courts operating in the same territory apply differing rules for litigants smilarly situated, but allocated by chance to different Courts."

XII.

IN IDAHO, IN AN ACTION AGAINST THE MASTER AND SERVANT WHERE THE DEFENDANTS ARE SUED AS JOINT TORT FEASORS, SEPARATE VERDICTS MAY BE RETURNED AGAINST THE SERVANT AND THE MASTER AND IN DIFFERENT AMOUNTS.

Browder v. Cook & Quane, 59 Fed. Supp. 675 (Ida.);

Judd v. O. S. L. Ry. Co., 55 Ida. 461, 44 Pac. (2d) 291;

Strickfaden v. Greencreek Highway District, 42 Ida. 738, 769, 248 Pac. 456 and cases cited;

Wallace v. Hartford Ins. Co., 31 Ida. 481, 174 Pac. 1009;

Alabama Great Southern Railway Co. v. Thompson, 200 U. S. 206, 50 L. Ed. 441;

Judd v. O. S. L. R. R. Co., 4 Fed. Supp. 657;

Gale v. O. S. L. R. R. Co., 4 Fed. Supp. 657;

Gale v. Independent Taxi Owners Ass'n, 84 Fed. (2d) 249;

8 *Cyc.* 804;

23 *Cyc.* 1470;

Hooks v. Vet, 192 Fed. 314;

Ohio Valley Bank v. Greenbaum Sons Bank & Trust Co., 11 Fed. (2d) 87;

Myers Admx. v. Brown, 61 S. W. (2d) 1052;

J. I. Case et al. v. Haynes, 199 S. W. 787;

Custis v. Puget Sound Bridge Co., 233 Pac. 936 (it was held in this case that a complete exoneration of the servant did not release the master. The facts showed that the master was negligent. If the master was negligent

in retaining Hair, a release of Hair would not release them);

Nashville C. & Lt. v. Byars, 67 S. W. (2d) 497;

Virgina Beach Bus Line v. Campbell, 73 Fed. (2d) 97.

The appellant does not contend there has been any satisfaction of the $7,500.00 judgment against Hair and in the absence of full satisfaction, the Appellees may elect as to which judgment they will attempt to collect.

Huey v. Dykes, 82 So. 481;

Nugent v. Boston Cousal Gas Co., 130 N. E. 488;

Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129;

Collard v. Delaware etc. R. R. Co., 6 Fed. 246;

Power v. Baker, 27 Fed. 396;

Albright v. McTighe, 49 Fed. 817;

Shainwold v. Lewis, 76 Fed. 839;

American Bell Telephone v. Albright, 32 Fed. 287, Cert. denied;

Western Coal Mining Co. v. Petty, 132 Fed. 603;

Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U. S. 111, 56 L. Ed. 1009, also see 24 L. Ed. 596.

The question is annotated and briefed in 27 A. L. R. 805, *Fitzgerald v. Campbell,* and in 65 A. L. R. 1083, *Verbacks v. Gillwan.*

See also:

Lewis v. Ingram, 57 Fed. (2d) 463, Cert. denied;

Virginia Bus Line v. Campbell, 73 Fed. (2d) 97, Cert. denied.

"Where one may bring action against joint trespassers severally, he may recover separate judg-

ments. If the judgments vary in amount, he may elect de melioribus damnis, but his election must precede acceptance of the satisfaction."

Western Coal & Mining Co. v. Petty, 132 Fed. 603.

XIII.

WHERE A VERDICT IS AGAINST ONLY ONE DEFENDANT, ANY OBJECTION TO THE SAME MUST BE TIMELY MADE AND ORDINARILY ONLY THE PERSON AFFECTED CAN OBJECT.

In the present case no objection was made as to the form of the verdicts. Counsel for both sides were consulted, and the appellants, without objection, consented that the forms of verdict submitted to the jury, should be submitted, and made no objection upon this basis when they were rendered.

Judd v. O. S. L. Ry. Co., supra, and the cases cited;

Gaines v. Durham, 117 S. E. 732;

Washburn v. Douthit, 73 Fed. (2d) 23;

Wright v. Safeway Stores, 109 Pac. (2d) 542.

XIV.

WHETHER CIRCUIT COURT OF APPEALS INTENDED TO REVERSE THE CASE AS TO HAIR OR NOT, IS OF NO CONSEQUENCE.

Counsel for appellees is not fully convinced or satisfied under the authorities that the case was not reversed as to Hair.

Washington Gas Light Co., v. Landsen, 172 U. S. 534, 43 L. Ed. 543;
Albright v. McTighe, supra;
Spottswood v. Dernham, (Ida.) 85 Pac. 1108.

Certainly if the action is joint the appeal was as to all. If not joint, but joint and several, then appellees may have different judgments under the Idaho rule and appellant is also liable independently of the servant's liability for its negligence in continuing Hair in its employ.

XV.

APPELLANT'S REQUESTED INSTRUCTIONS ARE NOT IN THE RECORD AND WERE NOT CALLED FOR BY APPELLANT.

Counsel for appellant had no way of knowing from the statement of the points relied on by the appellant, what particular specifications of error appellant would make. We now find that appellant specifies as error, the giving of instructions on the theory that Hair was a careless, reckless, drunken and incompetent driver on the ground that there was no competent evidence justifying a submission of this question to the jury.

Appellant's requested instructions on this phase of the case, to which they now object, to be specific: De-

fendant's requested instruction No. 6 is identical with the instruction set forth on page 27 of appellant's brief, under Specification of Error XXXVII., with the exception of three words, and their Specification of Error No. XXXVI., on page 26 is to an instruction given by the Court not in the exact language of appellant's request, but covering the matter thoroughly. A number of instructions given by the Court were adopted from appellant's requested instructions and appellant requested instructions on the question of waiver; of whether Hair was in the course of his employment; on the question of repudiation and on the question of his being a careless, reckless, drunken and incompetent driver and they cannot now complain that the Court instructed the jury upon these theories.

Subdivision (h) of Rule 75 of the Rules of Civil Procedure, provides:

> "Power of Court to Correct Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court."

Counsel for appellees could have had no way of knowing what particular specification of error the appellant would rely on or set out, and if the matter cannot be decided without considering the point here raised, then certainly the Appellate Court will direct that appellant's requested instructions or such of them as is necessary to determine their position, be printed.

XVI.

EXCEPTION TO VERDICT.

Appellant repeatedly calls attention to the fact that it excepted to the verdict. The record on this exception is found on pages 66 and 67 and shows that there is no valid exception taken or made. The entire record on this is as follows:

> "Thereupon, E. V. Smith, Esq., counsel for defendant took exception to the verdict of the jury."

The minutes set out precisely the entire proceeding. Appellant did not state upon what grounds it excepted to the verdict and made no statement whatever and took no exception whatever, except to state their exception in the following words:

> "We except to the verdict."

It is impossible to ascertain from the record who Mr. Smith, one of the counsel for appellant, was excepting for when he excepted to the verdict. Was it for Donnelly or was it for the Reynolds Tobacco Co.?

We submit that the case of *Wright v. Safeway Stores,* 109 Pac. (2d) 542 is squarely in point on the facts and the law. Up to the present time, neither Donnelly nor the appellant have requested the trial Court to take any action whatever, and furthermore, Darr, the Treasurer of the appellant and Donnelly, both having testified positively that the truck did not belong to Donnelly and that although the license for the same was taken out in Donnelly's name, it was done for convenience; the appellant cannot object that the jury apparently believed them and the jury apparently thought there was no basis for holding Donnelly if he did not own the truck.

ARGUMENT.

We will endeavor to follow the points or propositions set forth in the summary in this brief in the order there contained, insofar as the propositions therein set forth and relied upon, are argued specifically, and the following Roman numerals correspond with the numerals in the summary in this brief and contain the arguments of appellees on the propositions set forth in the summary.

I.

The Court did not abuse its discretion in permitting the trial to proceed without requiring appellees to pay the costs of the previous trial. Mr. Newby's affidavit under the statute, either as to being a poor person or as to being entitled to relief from collection of the

judgment under the Soldiers' and Sailors' Civil Relief Act, was not denied. The appellant had had ample notice of the setting of the trial and the conditions and circumstances upon which Mr. Newby would be permitted a leave from the service. To have denied him the right to proceed with his trial under such circumstances would have not only been contrary to the statutes cited, but would have been a harsh and unjust ruling. The District Court was familiar with all of the circumstances and there being no dispute as to the fact, the Court will surely not reverse this case upon that ground.

II.

A fair examination of the evidence will show that there is really no serious dispute as to the ultimate facts in the case. Avenell Newby was a guest and it is so alleged in the complaint. Hair was drunk and driving as a drunken driver, careening back and forth across the road in such a manner as to show both intoxication and utter recklessness. In his testimony, he admitted, after having carefully examined the exhibit showing the course of the truck, that the exhibit fairly represented the same. (R. 444.) He made the statement immediately after the accident to the witness, McGuire:

"That he was drinking and driving too fast" (R. 167) and he made no denial of that statement.

III.

The appellant had instructed Hair not to haul guests. Appellant knew definitely that Hair had hauled three guests, his wife and daughter and a drunken guest, Mr. Eckersley, at the time of the Meyers incident. The treasurer of the company had acknowledged this fact in a telegram and stated it was his disposition to get Hair's resignation. (R. 231.) Thereafter, Hair continued to haul guests repeatedly, and what is more, he hauled them when on company business. (R. 437, 417, 418 and 421.) Furthermore, Donnelly stated to George Newby:

> "My God, you have had another woman with you this time, too." (R. 177.)

Donnelly made similar statements to other witnesses. It cannot be fairly contended that this was not a question for the jury.

IV.

The evidence justifies a finding that Hair was acting for the appellant in the course of his employment. It was a part of his business to advertise the products of the company and to call on the trade. The Aero Club was one of his customers (R. 425) and he called on customers of this kind, either during the day or at night time.

> "Q. These night clubs or cafes that operate at night, were these your customers in your territory?
>
> A. Well, any place that carries tobacco is considered a customer. However, I don't call on

dealers that just sell cigarettes. I wasn't interested in selling cigarettes so much.

Q. If you call on these customers and if they want any of your products you will sell them won't you?

A. Yes, sir.

Q. Whether it was at night or in the day time?

A. Yes, sir." (R. 478.)

"Q. You visit customers in order to do just general work even when you didn't sell them?

A. Yes, sir.

Q. It was part of your business to call on them and tell them hello, whether you sold them tobacco or not?

A. Yes, sir." (R. 425-426.)

"Q. If anybody had asked you for tobacco on the 11th day of September, that is the day of the accident, you would have sold it to them, would you?

A. Yes sir." (R. 425.)

The Club at Soda Springs was a customer of his, in his territory and on the day of the accident, he called upon one of his dealers in Grace, apparently to say "hello".

"Q. That was one of the dealers you regularly dealt with?

A. Yes sir." (R. 423.)

The attempted explanation of this call, that Hair was looking for Rasmussen, to tell him what to tell his wife, is an afterthought; a matter of necessity, and completely destroyed because Hair had already told

Rasmussen in Soda Springs, to tell his wife that he would be late getting home. (R. 453.) Why would Hair go to Grace to tell Rasmussen the same thing he had told him several hours before? In addition, Hair was hauling the company products; was in his own territory; it was his duty to advertise and to place the advertising material. He stated in two reports that he was on company business. The second report was a corrected report made in Mr. Donnelly's presence.

V-VI.

The evidence with reference to the appellant's knowledge of Hair's drunken driving and his reputation, is materially different from that on the first trial. Again, the evidence is practically undisputed. There is no serious controversy on the facts unless such controversy is raised by the number of objections registered in the course of the trial. There is no dispute as to the knowledge that was brought to the company concerning the Meyers incident. The record shows Hair was openly violating his instructions in hauling guests; that he hauled three that evening, his wife, daughter and Eckersley. He was driving the truck to the night clubs. He and Eckersley were both drunk and had a bottle of whiskey in the company truck. The only witness who even feebly attempted to deny this, was Donnelly, who was not present. The Chief of Police, an experienced officer, advised Donnelly of this. Donnelly heard the police later testify to these facts, and so advised an officer of the company, Mr. Roe. It is significant that Hair never denied any of the facts; did not deny his drunkenness at that time and while

Mr. Donnelly gave hearsay testimony that Dr. Hughart did not think Hair was intoxicated, Dr. Hughart, who was in Pocatello and who is now a practicing physician there, and was so at the time of the trial, was not called as a witness. Hair was convicted of manslaughter, having been charged with drunkenness. Three officers testified that his general reputation was that of a reckless, drunken, incompetent driver. The appellant recognized the seriousness of the matter and in a telegram, Mr. Roe interceded with Mr. Darr, the treasurer of the company, to let Hair continue until after the trial.

> "Hair is out on bond. Trial will be next month. Donnelly thinks he will come clear. Would you consider him to continue until outcome is known? Donnelly regrets losing Hair due to his sales ability and past results. If possible would recommend we let Hair continue. Can have car repaired for small expense for time being. Wire instructions." (R. 231.)

The appellant knew that if Hair was convicted he should be discharged, and knew that his license would be revoked under the Idaho statute, and later knew that he was convicted and went to the expense of having Mr. Donnelly attend his trial in the District Court where Mr. Donnelly consulted with Hair's attorney concerning his defense.

Mr. Hair was later seen intoxicated while operating the company truck, by Sid Close, the sheriff in Clark County. He was seen by witness Pugmire operating the car on two occasions when there was something wrong with him. The Court would not permit Mr.

Pugmire to state what was wrong. Hair continued to violate company instructions with reference to hauling guests. He hauled women repeatedly and was seen with them by Mr. Close, and each time a different woman. Mr. Donnelly mailed to the company, the local newspaper report of Hair's intoxicated condition, his actions and the claims of the police at the time he killed Jacob Meyers. The local newspaper, of course, was the Pocatello Tribune, and Mr. Donnelly took exception to the report. He did not care to take cognizance of the drunkenness of Hair even though told specifically by the Chief of Police that he was drunk and that he had whiskey in the car. Mr. Roe did not care to take cognizance of it and neither did Mr. Darr who received the clipping from the local paper. Mr. Donnelly's testimony in relation to his activities in Pocatello, was so evasive, so unsatisfactory, so contradictory, that the jury was entitled to disbelieve every word he said, if they cared to. He even caused the Court to remark in the absence of the jury:

> "Although I will admit that I was not very much impressed by his testimony in that regard and am saying this in the absence of the jury." (R. 353.)

And the Meyers incident is referred to as one incident that did not give any notice and was trivial. It was an outrage upon society and cost the life of an innocent man and was notice to the appellant that Hair was a drunken driver, a violator of instructions and not to be trusted.

Hair and Donnelly put Hair's reputation squarely in issue by their testimony and their attempts to prove him a capable driver. Donnelly investigated his reputation and testified to this fact, but did not call a single person that he talked to or investigated it with, to the stand:

"Q. You made trips periodically over that territory after the Meyers incident in 1939?

A. That's right.

Q. On these trips you inquired of people and endeavored to find out what Mr. Hair's reputation was for driving?

A. That is correct.

Q. Did you make inquiry in Pocatello?

A. Yes sir.

Q. Did you make inquiry in Clark County?

A. Not that I remember.

Q. Did you make any inquiry of Mr. Pugmire, the Chief of Police in Pocatello?

A. I could have." (R. 481-482.)

Donnelly and Hair were bosom friends as shown by the testimony and as shown by their actions. They spent vacations together and Donnelly went to Hair's home for his meals.

There can be little doubt that Donnelly made the statements credited to him by Newby and the Teuscher boys. He did not even half-heartedly deny them. He stated he could not trust Hair and had gotten him out of the same scrapes before. What were the same scrapes? They were either scrapes hauling other women contrary to instructions or scrapes over driving when drunk, and it can make no difference which

they were, that put Donnelly and the company on their notice.

It is argued that Hair had a good record for three years. Yes, he did not kill anyone in that time and there are millions of drivers who have not killed anyone at all, and we wonder if any of the appellant's other salesmen have killed anyone at all. How many times is it necessary for a servant to kill someone while he is drunk and disobeying company instructions before the master has notice? We can hardly conceive that the Courts can regard such an occurrence, or are willing to hold that it is, in the nature of a minor or trivial incident, that does not give notice to the company.

In the opinion on reversal, the Appellate Court cited *Olson v. Northern Pacific Lumber Co.,* 106 Fed. 268; *Guedon v. Rooney,* 87 Pac. (2d) 209, and *Pittsburgh Railway Company v. Thomas,* 174 Pac. 591, as being authority for the proposition, "that a record of a single incident and the significance even of that, is seriously in dispute", was not sufficient to charge the master with knowledge. The proof at present takes the case entirely out of the rule laid down in the cases cited and *Guedon v. Rooney* becomes the strongest authority for appellees. In addition, the Court in *Olson v. Northern Pacific Lumber Co.,* had in mind minor incidents and this is shown conclusively by the Court's statement on page 308, to this effect:

> "To have discharged him on such grounds would not have been the act of a reasonable employer, but it would have been an unreasonable act, without common sense and justice."

Now, would it have been an unreasonable act to discharge Hair after killing Meyers when he was drunk? Apparently Mr. Roe did not think so, for he asked Darr in his telegram, for permission to keep employing him until they knew the outcome of the manslaughter charge.

Since the decision of this case on the first appeal, this Court has held in *Mareas v. Fred Harvey,* that the knowledge of the owner concerning the habits of a mule, was sufficient to charge the owner with notice of what the mule might do the next year. In view of the holding in this case, it does not seem that it is illogical or unreasonable to hold that a master is bound to take notice that the servant may again so act, in drinking and hauling guests, especially where the servant has a reputation for being a drunken, reckless driver, and where as here, the master has direct and positive information that its servant, while violating instructions, has become drunk and killed a person, and when it has direct notice that the servant has been convicted of manslaughter for the particular offense and that the information or criminal complaint charged that the killing occurred while the servant was intoxicated.

The record of Hair's conviction was competent upon several grounds, namely to show Hair's conviction of a felony; to show a knowledge of Donnelly in rebuttal of Donnelly's claim that Hair was not drunk, reckless or negligent at the time and as proof of the fact that he was a drunken driver and that the incident was brought home to the appellant.

Under all of these facts and circumstances, the evidence was ample to take the case to the jury upon this theory.

VII.

It is claimed at length that the testimony as to reputation offered, was not competent or admissible. The testimony of Close, Pugmire, Buskirk and Williams was addressed to the discretion of the Court; the proper foundation was laid as to the general reputation in the community and the authorities cited in our summary amply sustain the recit of this testimony.

An attempt is made to contend that peace officers cannot testify and that business men should be called. A perusal of the cases that have to do with a reputation for drunken driving or recklessness, show that in almost every instance, the testimony given is that of officers. Who would be more likely to know, and whose duty is it to observe these things?

The testimony of the witness Williams as to the reputation of Avenell Newby was of the highest class. If one has never heard anything derogatory said of an individual, certainly that individual has a good reputation. (*Hinson v. State,* 52 So. 194.)

VIII-IX-X.

The appellant consented that a general verdict might be submitted and made no objection to the form of the same. They did not make any request for a separate finding as to whether Hair was on company business;

whether appellant knew of his reputation; whether he actually was a careless, drunken, reckless and incompetent driver, or whether the company had notice; or whether they found for the plaintiff on both theories. It is too late on appeal to first object and contend that the evidence must support both theories. If the jury was justified in finding for the plaintiff on either theory, the verdict is sufficient.

And we call particular attention to the fact that appellant did not request any instruction that the jury was required to find for the appellees on both theories before they could return a verdict and they did not except to the Court instructing the jury, that appellees were entitled to recover on either theory. Their only exception was that there was no evidence to go to the jury on the question of the reputation of Hair and they specifically asked instructions on this phase of the case.

We are sure it is readily recognized by Courts and lawyers alike, that every side issue that enters into a case and that every objection raised cannot be argued to a final conclusion. A book could be written upon any single question raised in a case. All that Courts and lawyers can do is to see to it that a general and fair presentation of the case be made and that the main questions be properly presented to a jury so that they may intelligently pass upon it.

As appellees view this case, there are only two questions before the Court that were not previously decided. First: was the evidence sufficient to go to the jury on the question of Hair's being a careless, reck-

less, drunken and incompetent driver, and this has been discussed. Second: does the fact that the cause was reversed when Hair did not appeal, fix the ceiling on the amount that can be recovered against the appellant? That question was not in the case before and must now be decided.

XI-XII-XIII-XIV.

The case was originally filed in the State Court of Idaho. That Hair was a bona fide resident of the State of Idaho, cannot be questioned. He gave his address as his home in Pocatello when he made his reports to the company at the time of Mrs. Newby's injury. He lived in Pocatello continuously. However, counsel then acting for the appellees, permitted the case to be removed to the Federal Court. There can be no question if this cause were now in the Idaho Courts, what the holding would be. It is immaterial what the Courts of North Carolina hold, nor does it make any difference what the weight of authority is. The appellant put its agent in Idaho; had him operate their motor vehicle on its roads. They were bound by the decision in *Judd v. O. S. L. R.R. Co.,* supra, and by the other Idaho cases. To attempt to argue this matter is to take up a discussion of *Erie R.R. Co. v. Tompkins,* which would be of no advantage to the Appellate Court. What more can be said on this matter than was said by Justice Charles E. Clark in the citation heretofore given, when he said:

> "Throughout a given territory, one law ought to prevail; and it is a blot on the idea of justice if two courts operating in the same territory apply

different rules for litigants similarly situated, but allocated by chance to different courts."

It is contended that the case, *Department of Water and Power v. Anderson,* 95 Fed. (2d) 577, is authority for the proposition that the Ninth Circuit is committed to the rule that it will review a refusal to grant a new trial if the verdict is grossly excessive. Appellees submit that this case is not authority to review the action of the trial Court because the verdict in the instant case is not grossly excessive.

Regardless of that matter the opinion in this case was written March 28, 1938, prior to the time the present rules of Civil Procedure took effect and the opinion had to do with an action commenced a considerable time prior thereto.

We call attention to the analysis of the rules of Civil Procedure by the Honorable William D. Mitchell, who in discussing Rule 59, having to do with new trials, said:

"Of course, in the Federal courts, a motion for a new trial is unavailing unless granted completed. There is no appeal from the order granting or denying."

Appellees are not going to be drawn into further argument on the question of the failure of the Court to grant a new trial. Surely that matter is as well settled under the present rules as are the matters decided in *Erie R.R. Co. v. Tompkins.*

Appellees do not waive any of the points made in the summary by failing to argue them, but everything cannot be argued. The Court of Appeals undoubtedly

realized this when they limited briefs to a certain number of pages.

XV-XVI.

APPELLANT'S POSITION AND SPECIFICATION OF ERRORS.

Appellant at the trial complained bitterly because counsel for appellees introduced the cross-examination of Darr and called Donnelly for cross-examination, and are still arguing and complaining on that ground, and have made nineteen specifications of error concerning this matter. Specifications III to XXI inclusive, pages 11 to 17 of appellant's brief. They contend that it was prejudicial to permit Darr's cross-examination before his direct examination. The appellant took his deposition, testimony that helped make the appellees' case and was important, was brought out on cross-examination. What was proper and how was counsel for appellees to get this testimony in the record? What assurance did he have that the appellant would introduce this deposition in evidence? What would have been his standing if he had rested and then complained that the appellant did not put the deposition in evidence? How could he have complained if he had not cross-examined Donnelly and Donnelly had not been placed upon the stand? We simply cannot understand this objection and the time devoted to it in view of subdivision (d) of Rule 26 of the Rules of Civil Procedure; so much thereof as is applicable being quoted:

> "(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as

admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

"(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose."

The objection to the cross-examination of Donnelly is without any force whatever. Rule 43, subdivision (b), Rules of Civil Procedure:

"(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

An attempt is made to complain that the verdict is excessive. The appellant requested instructions on the measure of damages and the elements that could be considered and took no exception whatever to the instructions of the Court on this phase of the case.

The appellant complains in its argument, of the Court instructing the jury (Appellant's Brief, bottom of page 69):

> "The court elsewhere in its instructions advised the jury that all items touching the Meyers incident dealt merely with the question of a waiver of instructions against hauling guests. There was no reason for this instruction when the injunction against hauling guests had commenced anew after the Meyers incident."

The appellant cannot object to an instruction that is most favorable to it, and it is an unusual argument to contend that, after each violation of instructions, the master and servant can commence anew and that the prior violations may be forgotten and do not count.

The question of instructions as to the guest statute and as to the statutory provisions of Idaho concerning operation of a motor vehicle upon a highway, were definitely disposed of by this Court on the former appeal.

The trial Court was entitled to instruct the jury with the identical and precise instructions that were given in the former trial, if the evidence was sufficient to go to the jury on the question of the master's knowledge of Hair's activity. However, in addition the Court more fully instructed the jury and gave the instruction referred to in the concurring opinion of Justice Denman, as to the presumption that the driver of the automobile is the owner's agent, being rebuttable.

The record discloses that the trial Court tried diligently to follow the decision of the Court on appeal.

The matter is minor, but on page eleven under specification No. 11 of appellant's brief, it is indicated that the complaint was amended by counsel for appellees, by substituting the word "drunken" for incompetent. The record cited might give some color to that statement. However, the amendment as shown in the clerk's minutes shows that the word "drunken" was added, but not that the word "incompetent" was dropped and the Court's instructions clearly indicate that the complaint as amended was to the effect that Hair was a careless, reckless, drunken and incompetent driver. On page 22, specification of error XXXI of appellant's brief, it is stated that the amended complaint charged that appellant knew Hair,

> "to be a careless, reckless, drunken and incompetent driver."

It does not seem to be necessary to argue that it was not error to refuse to give a directed verdict under the present record, if it was not error to refuse to do so on the first trial.

We have heretofore mentioned the fact that appellant's requested instructions are not in the record. Appellant requested the instruction found under their specification of error on page 27 and the same was given. The same is true in general as to the exceptions to the instructions given.

The question of contributory negligence is not in the case and was definitely disposed of by the decision heretofore given.

On page 39 of appellant's brief, this statement is found:

> "There isn't a scintilla of evidence in the record showing that the appellant ever knew of Hair's hauling of a guest after the Meyers incident."

This statement overlooked Donnelly's statement to Hair in the presence of Newby and the Teuscher boys.

At page 74 of appellant's brief, it is said:

> "While this unfortunate adventure naturally provokes a sympathetic forgiveness yet it cannot help but reflect upon her value to her husband and children."

The appellant was not this subtle when the matter was presented to the jury. The record shows that they endeavored through the witness Perkins to attack the character of Avenell Newby, they put in every word of testimony on this phase of the matter that they desired. They endeavored to blacken her character by the testimony of Hair and Rasmussen. They did not, however, request any instruction whatever on this matter. It was perfectly apparent at the trial and is now, that where Hair and Mrs. Newby were the night before the accident could have nothing to do with whether Hair was on company business. It was perfectly apparent that regardless of any notice that Jack Perkins may or may not have given Mr. and Mrs. Newby to vacate the apartment, it could not have the faintest effect upon the issues in the case. This evidence was elicited and attempted to be brought out for the purpose of damaging Mrs. Newby. If the appellant failed in its purpose it can hardly ask the

Appellate Court to reverse this case because their testimony was not considered by the jury as they hoped it would be.

This case has been tried twice, resulting in a verdict for the appellees both times. If there ever was a case in which the rule that the Court and jury who see and observe the witnesses, are in better position to determine matters of fact than the Appellate Court, the rule is exemplified in this case.

The appellant was given an absolutely fair trial; its counsel had their own way in the matter of instructions as to the Meyers incident and as to the proof they desired to offer. The Court only refused to consider their contention that the jury could not return a verdict in a greater amount than $7500.00.

Every suggestion made by the Circuit Court of Appeals in its original opinion was adhered to by the trial judge. He could not fairly do other than present to the jury the questions as he presented them in view of the additional proof as to Hair's known intoxication when driving the company truck and the proof of his reputation by reputable witnesses.

It is respectfully submitted that the case must be affirmed.

Dated, Pocatello, Idaho,
December 26, 1945.

GLENN A. COUGHLAN,
B. W. DAVIS,
Attorneys for Appellees.